

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRADFORD N. OESCH, Individually and	§	
as Independent Executor of the Estate of	§	
NANCY OESCH, Deceased, and as Next	§	
Friend of ANGELA NICOLE OESCH and	§	
SAMANTHA RENE OESCH, Minors, and	§	
DORIS ROACH,	§	
<i>Plaintiffs</i>	§	
VS.	§	Civil Action No. 4:11-cv-770
	§	
WOMAN'S HOSPITAL OF TEXAS,	§	
WOMAN'S HOSPITAL OF TEXAS,	§	
INC., JAMES MARK MCBATH, M.D.,	§	
JAMES MARK MCBATH, M.D., P.A.,	§	
CENTOCOR, INC., CENTOCOR ORTHO	§	
BIOTECH, INC., and JOHNSON &	§	
JOHNSON, INC.	§	
<i>Defendants</i>	§	

DEFENDANTS JAMES MARK MCBATH, M.D. AND JAMES MARK MCBATH, M.D.,
P.A.'S RULE 12(b)(6) MOTION TO DISMISS

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

NOW COMES, Defendants, James Mark McBath, M.D., and James Mark McBath, M.D., P.A., and hereby files this his Rule 12 (b)(6) Motion to Dismiss and would show the court as follows:

PROCEDURAL BACKGROUND

1. Plaintiffs are Bradford N. Oesch, Individually and as Independent Executor of the Estate of NANCY OESCH, Deceased, and as Next Friend of Angela Nicole Oesch and Samantha Rene Oesch, Minors, and Doris Roach.
2. Movants are James Mark McBath, M.D. and James Mark McBath, M.D., P.A. (hereinafter referred to as "Movants" or "Dr. McBath").

3. This case was originally filed on January 31, 2011. Movants ask this court to take judicial notice of the filing of the file-stamped copy of Plaintiffs' Original Petition and Request for Disclosures filed in Cause No. 2011-06604 in the 151st Judicial District Court of Harris County, Texas. A true and correct copy is marked and attached as Exhibit "A" and incorporated herein for all purposes.

4. This case was subsequently removed into Federal Court on or about March 4, 2011 by Defendants Johnson & Johnson, Inc., Centocor, Inc.; Centocor Ortho Biotech, Inc.

5. Movant moves to dismiss the present complaint as it relates to James Mark McBath, M.D., and James Mark McBath, M.D., P.A. for failure to comply with **Ch. 74.351 of the Texas Practice and Remedies Code** requiring the filing of an expert report within 120 days of the original filing of the lawsuit or, in the alternative, Movant moves for Summary Judgment pursuant to Federal Rules of Civil Procedure 56.

Rule 12(b)(6) Motion to Dismiss

6. The function of a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is to "assess the legal feasibility of a complaint" *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 776 (2nd Cir. 1984) (citation omitted). A motion to dismiss is properly granted "when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). A motion to dismiss must be decided on the facts as alleged in the complaint. *Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

7. Movant would show that at all times, beginning with the *original* filing of this cause in the 151st District Court of Harris County, Texas, Plaintiffs have asserted a health care liability claim against James Mark McBath, M.D., and James Mark McBath, M.D., P.A. (See Exhibit “A” incorporated herein for all purposes).

8. In Texas, health care liability claims are governed by Chapter 74 of the Texas Civil Practices and Remedies Code. Movant would show that, as a result of the health care liability claims alleged against Dr Pendleton, Plaintiffs are subject to the procedural requirements of Tex. Civ. Prac. & Rem. Code §74.351. CPRC §74.351. Expert Report, provides the following:

- (a) “In a health care liability claim, a claimant shall not later than the 120th day after the date the Original Petition was filed, serve on each party, or the party’s attorney, one or more expert report, with a Curriculum Vitae, of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted;
- (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the Motion of the affected physician or health care provider shall, subject to Subsection (c), enter an order that:
 - 1. awards the affected physician or health care provider reasonable attorney’s fees and costs of court incurred by the physician or health care provider; and
 - 2. dismisses the claim with respect to the physician or health care provider, with prejudice to refiling of the claim.”

Tex. Civ. Prac. & Rem Code §74.351 (emphasis added).

9. Movant would show that as of the date of the filing of this Motion, Plaintiffs have wholly failed to file their expert report as to Defendant, along with a copy of the expert’s CV, on or before the expiration of 120 days from January 31, 2011 or on or before **May 31, 2011** (see also FRCP 6). As shown from the file-mark herein, Plaintiffs did not file their Notice of Expert Report pursuant to § 74.351 until **June 1, 2011** (a true and correct copy of said cover letter to counsel, along with a

copy of David Befeler, M.D.'s Expert Report and C.V. are marked and attached as Exhibit "B" and incorporated herein for all purposes.

Movant asks that the court take judicial notice that the filing date stamped on said "cover letter" and "Expert Report of Dr. Befeler" shows that it was filed on June 1, 2011.

10. Both Texas and Federal Courts have mandated that the failure to comply with §74.351 requires the trial court to dismiss with prejudice a plaintiff's claims against said physician. *See American Transitional Center of Texas, Inc. v. Palacios* 36 S.W. 3rd 873 (Tx. 2001); *Cruz v. Chang*, 400 F. Supp2d 906, 915 (U.S. Dist. Court – W.D. Texas, El Paso Div., 2005).

11. Pursuant to the *US District Court, Southern District of Texas Administrative Procedures Electronic Filing in Civil and Criminal Cases* (2007 Section 3(b), "A document filed electronically is deemed filed at the date and time stated on the *Notice of Electronic Filing* issued by the Court."

SUMMARY JUDGMENT EVIDENCE AND MOTION TO DISMISS EVIDENCE

12. In support of this Motion to Dismiss and Motion for Summary Judgment, Movant submits the following evidence:

- Exhibit 1: Plaintiffs' Original Petition filed in 2011-06604 in Harris County, Texas;
- Exhibit 2: Plaintiffs' cover letter for filing Expert Report and copy of Dr. Befeler's Expert Report noting the following date of June 1, 2011.

ATTORNEY'S FEES

13. Defendant reserves the right to submit additional evidence as to the amount of reasonable and necessary attorney's fees which are required to be assessed in the event this court determines that the expert report was not filed within 120 days as required by § 74.351 and/or is deficient and/or fails to constitute a "good faith" report.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Movants pray that this court grant Movants' Motion to Dismiss as to all claims against James Mark McBath, M.D., and James Mark McBath, M.D., P.A. with prejudice and that this court award reasonable and necessary attorney's fees and costs as well as any other relief to which Movants are justly entitled to.

Respectfully Submitted,

**ANDERSON, LEHRMAN,
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ATTORNEYS FOR DEFENDANTS,
JAMES MARK MCBATH, M.D., AND
JAMES MARK MCBATH, M.D., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to opposing counsel via facsimile and/or ECF on this 17th day of June, 2011, as follows:

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